

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Biltmore Broadcasting, L.L.C.)	CSR-5803-A
)	
For Modification of the Santa Barbara-)	
Santa Maria-San Luis Obispo,)	
California DMA)	

MEMORANDUM OPINION AND ORDER

Adopted: March 19, 2002

Released: March 20, 2002

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. Biltmore Broadcasting, L.L.C., licensee of station KADY-TV (Ch. 63), Oxnard, California ("KADY-TV"), filed the above-captioned petition for special relief seeking to modify the Santa Barbara-Santa Maria-San Luis Obispo, California designated market area ("DMA") to include thirty-eight communities located within the Los Angeles, California DMA.¹ Oppositions to this petition were filed on behalf of AT&T Broadband ("AT&T") and Century-TCI California, L.P. d/b/a Adelphia Cable Communications ("Adelphia") and comments were filed on behalf of Costa de Oro Television, Inc., licensee of television broadcast station KJLA (Ch. 57), Ventura, California ("KJLA"). KADY-TV filed a consolidated reply to AT&T and Adelphia's oppositions and a separate reply to KJLA's comments.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues ("*Must Carry Order*"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.² A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media

¹The communities requested for inclusion are: Baldwin Hills, Beverly Hills, Castaic, Corral Canyon, Culver City, Eagle Rock, Florence, Hermosa Beach, Hollywood, Inglewood, Ladera Heights, Lennox, Manhattan Beach, Marina del Rey, Maywood, Mission Hills, Newhall, North Hills, Pacific Palisades, Pacoima, Panorama City, Playa del Rey, Redondo Beach, Santa Monica, Sherman Oaks, Stevenson Ranch, Sun Valley, Sunland, Sylmar, Tujunga, Universal City, Valencia, Venice, West Hollywood, West Los Angeles, Westchester, Westwood and Willow Brook, California.

²8 FCC Rcd 2965, 2976-2977 (1993).

Research.³ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

... with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

... the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides new coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the

³Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁴For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵47 U.S.C. §534(h)(1)(C).

⁶*Id.*

[DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

(C) Available data on shopping and labor patterns in the local market.

(D) Television station programming information derived from station

⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸*Must Carry Order*, 8 FCC Red at 2977 n. 139.

⁹The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. The issue before us is whether to grant KADY-TV's request to include the thirty-eight requested communities within its television market. KADY-TV is assigned to the Santa Barbara-Santa Maria-San Luis Obispo DMA, while Los Angeles County, where the communities are located, is within the Los Angeles DMA.

6. In support of its request, KADY-TV argues that its request should be granted because it meets the market modification criteria. KADY-TV asserts that it meets the historic carriage factor because it is carried on cable systems within the Los Angeles DMA that serve areas adjacent to the requested communities.¹¹ KADY-TV argues that the Commission has previously held that carriage by local cable operators is "probative as to the scope of the market involved and is convincing evidence that the station's programming is of particular interest to viewers in the area."¹² KADY-TV states that its predicted Grade A contour encompasses all of the communities at issue.¹³ KADY-TV notes that the Commission has stated that a station's Grade A or Grade B contour coverage is an indicator of local service.¹⁴ In addition, KADY-TV maintains that it provides programming which is not only of interest to California coast residents in general, but of particular interest to the residents of the requested communities.¹⁵ KADY-TV states that not only does it air locally-produced public affairs programming,

¹⁰ 47 C.F.R. §76.59(b).

¹¹ Petition at 6 n. 20.

¹² See e.g., *Time Warner Cable*, 10 FCC Rcd 8045, 8048 (1995); *Time Warner Cable*, 10 FCC Rcd 6663 6667 (1995).

¹³ Petition at Exhibit 3.

¹⁴ See e.g., *Media General Cable of Fairfax County, Inc.*, 15 FCC Rcd 149, 155 (2000); *Busse Broadcasting Corporation*, 11 FCC Rcd 6408, 6420 (1996); *Must Carry Order*, 8 FCC Rcd at 2977; *DP Media License of Battle Creek, Inc.*, 13 FCC Rcd 7122, 7127 (1998); *Channel 56 of Orlando, Inc.*, 12 FCC Rcd 4071, 4081 (1996).

¹⁵ Petition at Exhibit 6.

but also local news and weather.¹⁶

7. KADY-TV argues that it is geographically proximate to the communities at distances ranging from 40 to 53 miles from its transmitter site.¹⁷ KADY-TV states that these distances are well within the range found acceptable in previous Commission decisions which either granted the addition of communities or denied requests for exclusion.¹⁸ KADY-TV asserts that Nielsen audience ratings indicate that it is viewed in a number of the cable communities for which it requests market modification.¹⁹ Moreover, KADY-TV states that it is used as a vehicle by at least 71 advertisers serving the greater Los Angeles area and is listed in the major television viewing guides distributed in the cable communities, including the Los Angeles edition of *TV Guide*, the *Los Angeles Times*, and the *Los Angeles Daily News*.²⁰ KADY-TV argues that Ventura County, where its city of license is located, is geographically and economically linked to the Los Angeles area.²¹

8. Finally, KADY-TV argues that grant of its request is justified by the Bureau's previous action in *Costa de Oro Television, Inc.*, which granted the inclusion of Los Angeles market communities within the market of KJLA, another Ventura County station.²² KADY-TV points out that KJLA broadcasts from the same tower as KADY-TV and the signal contours of both stations are virtually identical.²³ KADY-TV argues that the Commission has long recognized the importance of treating similarly-situated parties alike and that if it wishes to treat them differently, it must adequately explain its reasons for doing so.²⁴ In this instance, KADY-TV maintains that there are no differences between KADY-TV and KJLA which justifies differing treatment.

9. Adelphia argues in opposition that KADY-TV fails to demonstrate that the requested communities should be included in its market and its petition should be denied, at least as far as Adelphia's communities are concerned.²⁵ Adelphia argues that the *Costa de Oro* case which KADY-TV cites in support of its request is distinguishable from KADY-TV's situation.²⁶ Adelphia asserts that, in that decision, the Bureau stated that "there is another station transmitting from the same antenna site

¹⁶*Id.* at Exhibit 7.

¹⁷*Id.* at Exhibit 8.

¹⁸See e.g., *KNTV License, Inc.*, 16 FCC Rcd 6785 (2001) (35-55 miles); *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087 (1998) (50 miles); *Burnham Broadcasting, Inc.*, 10 FCC Rcd 7117 (1997) (48 miles); *Time Warner Cable*, 10 FCC Rcd 8045 (1996) (60 miles); *Cablevision Systems Corporation*, 11 FCC Rcd 6453 (1996) (48-55 miles); *Time Warner Cable*, 11 FCC Rcd 3510 (1996) (45 miles).

¹⁹Petition at Exhibit 9.

²⁰*Id.* at Exhibits 10 and 11.

²¹*Id.* at 11.

²²13 FCC Rcd 4360 (1998); *recon. denied*, 15 FCC Rcd 12637 (2000).

²³Petition at Exhibits 3 and 4.

²⁴*Id.* at 4, citing *Petroleum Communications, Inc. v. FCC*, 22 F. 3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.").

²⁵Adelphia states it serves the communities of Marina del Rey, Beverly Hills, Santa Monica, West Hollywood, Hermosa Beach, Manhattan Beach, and Redondo Beach.

²⁶13 FCC Rcd at 4374.

which has not joined in this request and which appears to accept Santa Barbara as its market.”²⁷ In any event, Adelphia notes that despite purported Grade B coverage, factors such as intervening mountain ranges played a part in the Bureau’s decision in *Costa de Oro*, which only partially granted KJLA’s request for inclusion.²⁸ Indeed, Adelphia points out that on reconsideration, the Bureau denied some of the communities it had originally granted for inclusion.²⁹ Adelphia states that the *Costa de Oro Reconsideration* also specifically rejected KJLA’s claim that predicted Grade B coverage was enough to warrant the requested communities’ inclusion because the terrain involved made “predicted contours . . . particularly unreliable.”³⁰ Adelphia argues that more relevant precedent can be found in decisions which recognized the fact that, because Arbitron Ratings Company divided Ventura County into eastern and western portions for station coverage due to terrain, the western portion, where KADY-TV’s city of license, Oxnard, is located is considered local to Ventura County and not the Los Angeles DMA.³¹

10. Adelphia maintains that Section 614(h)(1)(C) of the Act directs the Commission to take four specific factors into account in analyzing modification requests and that the Commission has no authority to ignore these factors in their evaluation.³² As a result, Adelphia argues that if a petitioner cannot satisfy any one of these statutory factors, or fails to make a showing on any one, the Commission must deny the petition.³³ In this instance, Adelphia states that KADY-TV has not even attempted to demonstrate under the third statutory factor that Adelphia does not already carry local television stations which air programming specifically targeted to the communities it serves. Moreover, Adelphia points out that, with regard to Adelphia’s communities, KADY-TV failed to provide evidence that it satisfied the historic carriage factor, provided meaningful viewership or provided programming of specific interest to Adelphia’s communities.³⁴ Adelphia notes that in a previous decision, the Bureau denied a television station’s modification request based on its failure to provide a showing on the statutory factors.³⁵ Adelphia states that, as demonstrated by KADY-TV’s own maps, all of the communities in which it claims historic carriage are significantly closer to Oxnard than are Adelphia’s communities.³⁶ Adelphia indicates that, not only has KADY-TV never been carried on its systems, but it is not carried on any other nearby cable systems.³⁷ Adelphia states that KADY-TV also has no reportable viewership in Los Angeles County, where the subject communities are located.³⁸

²⁷*Id.*

²⁸*Id.*

²⁹*Costa de Oro Reconsideration*, 15 FCC Rcd at 12645-46.

³⁰*Id.* at 12642.

³¹See e.g., *Smith Broadcasters of Santa Barbara Limited Partnership*, 10 FCC Rcd 9447 (1995); *Avenue TV Cable Service, Inc.*, 11 FCC Rcd 4803 (1996), *aff’d*, 11 FCC Rcd 10419 (1996); *Costa de Oro Television*, 10 FCC Rcd 9468 (1995), *aff’d*, 12 FCC Rcd 22464 (1997), *aff’d by judgment sub nom*, 335 U.S. App. 318 (D.C. Cir. 1998).

³²Adelphia Opposition at 7; *see also* 47 U.S.C. §534(h)(1)(C).

³³Adelphia Opposition at 8.

³⁴*Id.*

³⁵*Id.*, citing *Idaho Independent Television, Inc.*, 11 FCC Rcd 21060 (1996).

³⁶*Id.*, citing Petition at Exhibit 6.

³⁷*Id.* at Exhibits A and B.

³⁸*Id.* at 10.

11. Adelphia asserts that there is no evidence that KADY-TV is the type of “weaker” station described by the Bureau in previous decisions.³⁹ Adelphia argues that KADY-TV’s lack of historic carriage in or near Adelphia’s communities merely indicates that the residents do not consider KADY-TV a local station.⁴⁰ Moreover, Adelphia states that KADY-TV apparently operates at a transmitting power of 5000 kilowatts, which is considered normal to strong for a full-power commercial station and not characteristic of a “weaker” station in technical terms.⁴¹ Adelphia points out that it does not carry any other Santa Barbara market station, including KJLA, which is unable to deliver a good quality signal to its cable systems.⁴² Adelphia argues further that KADY-TV’s claim of predicted Grade A or B contour coverage in the communities is belied by the station’s inability to deliver a good quality signal to Adelphia’s headends.⁴³ In any event, Adelphia maintains that the Cable Act does not elevate Grade A or Grade B coverage over the other market modification factors.⁴⁴

12. AT&T states in opposition that it serves 21 of the 38 communities KADY-TV requests for inclusion.⁴⁵ It maintains that KADY-TV’s petition should be denied because the station has failed to demonstrate that it adequately meets the market modification criteria with regard to AT&T’s communities. AT&T argues that KADY-TV’s attempt to piggyback its request on the *Costa de Oro* decision is misplaced. AT&T states that, unlike KADY-TV, KJLA had Grade A coverage over the communities for which it was granted inclusion and, in addition, KJLA was actually reassigned to the Los Angeles DMA from the Santa Barbara market as of January 1, 2000.⁴⁶ AT&T points out that not only has KADY-TV never been carried on any of its cable systems in the 16 years it has been in operation, but the Los Angeles County communities in which it claims carriage all appear to be significantly closer to Ventura County than to any of the communities for which KADY-TV is seeking inclusion.⁴⁷

13. AT&T argues that although KADY-TV claims that each of the communities falls within its Grade A contour, a Longley-Rice study demonstrates that none of the subject communities lie within KADY-TV’s Grade A contour and only one community, Tujunga, barely lies within the station’s Grade B contour.⁴⁸ AT&T states that the Commission has held that “[t]he Longley-Rice model provides a more accurate representation of a station’s technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis.”⁴⁹

³⁹ *Id.* at 11, citing Petition at 7; see *Time Warner Cable*, 10 FCC Rcd at 8048 (affording undue weight to historic would, “in effect, prevent weaker stations which cable systems had previously declined to carry, from ever being carried.”).

⁴⁰ Adelphia Opposition at 12.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 14.

⁴⁴ *Id.* at 14, citing *Must Carry Order*, 8 FCC Rcd at 2977.

⁴⁵ AT&T states it serves the following communities: Castaic, Newhall, Stevenson Ranch, Sylmar, Tujunga, Sunland, Valencia, Maywood, Willow Brook, Florence, Baldwin Hills, Culver City, Hollywood, Inglewood, Ladera Heights, Lennox, Marina del Rey, Playa del Rey, Venice, West Los Angeles and Westchester.

⁴⁶ AT&T Opposition at 2.

⁴⁷ *Id.* at Exhibit 4.

⁴⁸ *Id.* at Exhibit 3.

⁴⁹ *Id.* at 3-4, citing *Modification Final Report and Order*, 14 FCC Rcd at 8388.

AT&T states that this is especially important in this situation where KADY-TV is separated from the communities in question by the Santa Monica Mountains, the Santa Susana Mountains and the Simi Hills.⁵⁰ AT&T argues further that KADY-TV's city of license is geographically distant from its cable communities, at an average of 49 miles. AT&T notes that these distances are comparable to those in prior Commission decisions which granted requests for exclusion.⁵¹

14. AT&T asserts that KADY-TV does not provide any programming specifically tailored to its communities.⁵² Indeed, AT&T states, KADY-TV's programming appears to consist entirely of syndicated and paid programming which has no nexus or relevance to the residents of the communities.⁵³ Moreover, AT&T states that KADY-TV does not dispute that AT&T already carries other stations that provide ample local programming to its subscribers.⁵⁴ Finally, AT&T argues that the Nielsen report which KADY-TV submits as evidence of its viewership gives no indication of what percentage of the data listed is attributable to the subject communities. AT&T points out that a separate viewership study it conducted was unable to find any ratings for KADY-TV in Los Angeles County.⁵⁵ In addition, AT&T maintains that the version of *TV Guide* submitted by KADY-TV does not support its request because that version appears to be specifically designed for cable viewers located in the Ventura area.⁵⁶ Finally, AT&T argues that the fact that some businesses in Los Angeles County choose to advertise on KADY-TV does not demonstrate that KADY-TV has any viewers in or targets the communities at issue.

15. In its consolidated reply, KADY-TV argues that neither Adelphia nor AT&T has provided any basis for ignoring Commission precedent regarding the use of a station's Grade A contour to determine its television market. KADY-TV states that they have also not shown that it fails to meet the statutory criterion for market modification. KADY-TV states that Adelphia and AT&T urge the Commission to disregard KADY-TV's Grade A contour coverage in evaluating the instant request and instead rely on "actual" signal coverage tests and interference issues. KADY-TV argues that in *Costa de Oro* the Bureau analyzed the cable operators' claims of terrain interference and actual signal coverage with regard to KJLA and found that market modification was warranted for communities within the station's Grade A contour.⁵⁷ KADY-TV maintains that its predicted Grade A contour covers essentially the same area.⁵⁸ KADY-TV states that Adelphia and AT&T have not pointed to a single case in which the FCC denied a petition to add a cable community within a broadcast station's Grade A contour.⁵⁹

⁵⁰ AT&T Opposition at 4.

⁵¹ *Id.* at 5, citing *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 22220 (1998) (39-79 miles); *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347 (1997) (38-61 miles); *Time Warner Cable*, 12 FCC Rcd 23249 (1997) (42-58 miles); *Time Warner Cable*, 11 FCC Rcd 13149 (1996) (45 miles); *Cablevision of Cleveland and V Cable, d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034 (1996) (41 miles).

⁵² *Id.* at 5.

⁵³ *Id.*

⁵⁴ *Id.* at 7 and Exhibits 2 and 5.

⁵⁵ *Id.* at Exhibit 6.

⁵⁶ *Id.* at 8.

⁵⁷ Consolidated Reply at 2.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

16. KADY-TV argues that the distances between KADY-TV's transmitter and the cable communities are well within the range that the Commission has found acceptable in granting market modifications.⁶⁰ KADY-TV argues that the fact that mountains lie between its transmitter site and the subject communities does not provide an independent basis for denying the petition because the Bureau has discounted such barriers in previous decisions.⁶¹ KADY-TV states that its programming is of the type previously found to serve local interests. Moreover, KADY-TV maintains that, since becoming an independent station in September 2001, it has increased its local programming, including segments focused on the Los Angeles area.⁶² KADY-TV argues that Adelphia's and AT&T's allegation that KADY-TV failed to address whether other stations serving the subject communities provided programming of interest is without merit. KADY-TV states that the Commission has made it clear that "this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue" and is relevant only when a station does not provide any local service.⁶³ In addition, KADY-TV asserts that AT&T's attempt to discount the significance of local advertising is unfounded, particularly as the Commission has previously rejected such an assertion.⁶⁴ Finally, KADY-TV points out that as of January 1, 2002, it is carried via DirecTV and Echostar satellite systems throughout the entire Los Angeles DMA pursuant to the DBS must carry regulations.⁶⁵ KADY-TV states that such carriage far exceeds what it is asking for in its instant petition.

17. In its comments, KJLA states that it neither supports nor objects to KADY-TV's request, but seeks to comment on the differences between the two stations. KJLA states that it has long maintained that market modifications should be premised on more than just the technical facilities of a station. However, KJLA notes the fundamental basis of KADY-TV's petition appears to be that, because it operates from the same transmission tower as KJLA and has similar power, it should be entitled to must carry status on the same cable systems. KJLA argues that a station's natural market is the area it seeks to serve with both technical facilities and with programming.⁶⁶ Therefore, it asserts, if the Bureau should grant KADY-TV's request, it should do so based on more than just the station's Grade A coverage.⁶⁷

18. KJLA notes that, although it has fought since 1992 to gain carriage in the Los Angeles market, it has taken KADY-TV nine years to decide that it is being denied access to viewers outside its own market. KJLA argues that it appears that KADY-TV's petition is merely an attempt by the station to expand its coverage beyond its natural market.⁶⁸ KJLA points out that, since January 1, 2000, it has been

⁶⁰*Id.* at 6, citing *Paxson Phoenix License, Inc.*, 13 FCC Rcd 8555 (1998) (47.8 miles); *Erie Cablevision, Inc.*, 13 FCC Rcd 6403 (1998) (63.34 miles); *West Valley Cablevision Industries, Inc.*, 12 FCC Rcd 12103 (1997) (64 miles).

⁶¹*Id.*, citing *Costa de Oro*, 13 FCC Rcd at 4374; *Comcast Cablevision*, 12 FCC Rcd 6461, 6469 (1997).

⁶²*Id.* at Exhibit 2.

⁶³*Id.* at 10, citing *Pappas Telecasting Incorporated*, 11 FCC Rcd 6102, 6107 (1996); *Bradenton Broadcast Television*, 11 FCC Rcd 21044, 21049 (1996); *Good Companion Broadcasting, Inc.*, 11 FCC Rcd 4826, 4835 (1996); *Smith Television of New York, Inc.*, 10 FCC Rcd 7127, 7130 (1995).

⁶⁴*Id.*, citing *Smith Television of New York, Inc.*, 10 FCC Rcd at 7130; *Good Companion Broadcasting, Inc.*, 11 FCC Rcd at 4835.

⁶⁵*Id.* at 10.

⁶⁶KJLA Comments at 2.

⁶⁷*Id.* at 2.

⁶⁸*Id.* at 3.

assigned to a different market from KADY-TV. While KADY-TV continues to enjoy carriage rights throughout the Santa Barbara market, KJLA states that it lost those rights on January 1, 2000 and, to its knowledge, is not carried anywhere within that market.⁶⁹ KJLA maintains that KADY-TV is seeking to extend its carriage rights into a second market based solely on the technical similarity between its facilities and those of KJLA.

19. KJLA points out that KADY-TV sought out and acquired an affiliation with the UPN network for the Santa Barbara market and that, therefore, it is contractually obligated to serve a market which is distinct from the one in which it now seeks carriage.⁷⁰ KJLA states that the Los Angeles market already has a UPN affiliate, KCOP, and KADY-TV's request, if granted, would provide must carry rights to two UPN affiliates in western Los Angeles County. KJLA states it is an independent station which has chosen to serve its viewers from a studio located in West Los Angeles and it provides programming which is directed specifically to the bilingual Latino audience of the Los Angeles market.⁷¹

20. In reply, KADY-TV argues that, instead of presenting accurate facts to justify denial of the modification, KJLA merely accuses KADY-TV of "riding the coattails" of their previous market modification. KADY-TV asserts that KJLA's arguments herein are simply an attempt to reargue its own pending applications for review. Moreover, KADY-TV notes that KJLA's assertion that KADY-TV is the UPN affiliate for the Santa Barbara market is in error.⁷² KADY-TV states that it did once hold that affiliation, but that agreement expired in September 2001 and was not renewed.⁷³ KADY-TV states that it is now an independent station and, like KJLA, produces and airs its own local programming in addition to syndicated and paid programs.⁷⁴

21. We are not convinced that modification of KADY-TV's market is warranted. KADY-TV places the most emphasis on the Bureau's decision in *Costa de Oro*, which partially granted KJLA's request for modification to include several communities located within the Los Angeles DMA. KADY-TV maintains that because KJLA is licensed to a community in Ventura County, as is KADY-TV, and because it transmits from the same tower as KADY-TV, KADY-TV is thus entitled to similar treatment in its request for modification. There are several factors which distinguish the two situations. At the time of the *Costa de Oro* decision, the Commission relied on the Arbitron's "areas of dominant influence" ("ADIs") to determine the markets of television stations and KJLA was assigned to the Santa Barbara ADI. However, the Commission was on the eve of switching to the use of Nielsen's DMAs to determine markets and had stated that, in light of this proposed transition, "information regarding DMAs could be useful in deciding individual cases" where a change in market might occur due to the transition.⁷⁵ Because Nielsen had assigned KJLA to the Los Angeles DMA, this factor was of paramount importance in determining whether to grant any or all of KJLA's requested modification, despite the fact KJLA met few of the necessary market modification criteria. Ultimately, the Bureau granted KJLA's request with

⁶⁹ *Id.* at 3-4.

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

⁷² KJLA Reply at 3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, 11 FCC Rcd 620, 6223 (1996) ("Market Definition Order").

respect to those communities located within its predicted Grade A contour.

22. In the instant case, KADY-TV is still considered by Nielsen to be part of the Santa Barbara DMA, despite the fact that Ventura County, where KADY-TV's city of license is located, is considered to be part of the Los Angeles DMA. In addition, KADY-TV does not meet any of the market modification factors. While KADY-TV claims historic carriage based on the fact that it is carried in some Los Angeles market communities, it does not have a history of carriage in any of the requested communities nor in any communities immediately adjacent to them. It is also noteworthy that neither Adelphia nor AT&T carry any other Santa Barbara market stations. KADY-TV has not shown that the programming it provides has any specific nexus to the residents of the subject communities nor has it shown that it achieves any viewership in the communities. Although KADY-TV has shown that the subject communities are located within its predicted Grade A contour, a Longley-Rice study submitted by AT&T indicates that none of the communities actually receive a Grade A signal. We also note that, unlike KJLA, KADY-TV is not a "specialty" station where it would be expected that viewership would be minimal and carriage more problematic. KADY-TV has no measurable audience in Los Angeles County, despite being on-the-air since 1985 and being a full power commercial station. We also do not find either the advertising evidence presented by KADY-TV or its listing in *TV Guide* to be persuasive enough to overcome the other deficiencies. The advertisers KADY-TV points to appear to be general in nature, with no specific connection to the communities requested for inclusion and the edition of *TV Guide* to which KADY-TV refers appears to focus on the Ventura County portion of the Los Angeles market. From the fact that Nielsen continues to assign KADY-TV to the Santa Barbara market and the geographical boundaries which exist between Ventura County and Los Angeles, it appears that KADY-TV's main focus is directed more towards Santa Barbara than towards Los Angeles. In light of the above, we find that a grant of KADY-TV's request is not in the public interest.

IV. ORDERING CLAUSES

23. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534) and Section 76.59 of the Commission's rules (47 C.F.R. §76.59), that the captioned petition for special relief (CSR-5803-A), filed by Biltmore Broadcasting, L.L.C. **IS DENIED**.

24. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.⁷⁶

FEDERAL COMMUNICATIONS COMMISSION

Deborah Klein, Chief
Consumer Protection and Competition Division
Cable Services Bureau

⁷⁶ 47 C.F.R. §0.321.